IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

MRS. DAVID A. BUCKLEY, *Petitioner,*

v.

J. YANCEY CHRISTMAS, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS BELOW.

The findings and opinion of the District Court are found in R. 197-213.

The opinion in the Circuit Court of Appeals is reported in 121 Fed. (2d) 323, and is found at R. 222-227.

The petition to the Circuit Court of Appeals for rehearing was made and denied without opinion, On July 22, 1941.

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a). The order affirming the judgment of the District Court and denying the petition for rehearing was entered July 22, 1941 (R. 245). An order

staying the mandate until September 22, 1941, pending an application for a writ of certiorari to this Court was entered August 22, 1941, by the Circuit Court of Appeals.

RULES INVOLVED.

Rules 13(b), 52(a), 54(b) and 54(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), are set out in an appendix at pages 24 to 27.

STATEMENT.

The statement of the case already given in the petition under the heading, "Summary Statement of Matter Involved" is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred in finding that:

1. The reasonable value of the mare, "Cleaning Time", unless returned to petitioner, was not the subject of an offset.

2. The return of the mare, "Cleaning Time", and an accounting of her earnings was the subject matter of an independent cause of action between the parties.

3. The transactions between petitioner and respondent did not require an adjudication affecting the return, possession and future earnings of the mare, "Cleaning Time".

4. The petitioner was not entitled to an offset requiring respondent to return the mare, "Cleaning Time", or in lieu thereof to a deduction of the mare's reasonable value upon payment of the judgment herein.

5. The petitioner's counterclaim did not put in issue the repossession of the mare "Cleaning Time" or in lieu thereof the payment of its reasonable value.

6. The denial of petitioner's "First" counterclaim was not erroneous under Rule 52(a) of the Federal Rules of Civil Procedure.

7. The error in the admission of the written agreement, Exhibit 5, did not warrant a reversal of the judgment herein.

8. There was a verbal understanding between the parties for free stud services of the stallion "Grand Time".

9. The denial of petitioner's "Third" counterclaim was not erroneous under Rule 52(a) of the Federal Rules of Civil Procedure.

10. In affirming the judgment of the District Court.

SUMMARY OF THE ARGUMENT.

The points of the brief are summarized in the Subject Index.

ARGUMENT.

Point I.

Petitioner's "first" counterclaim placed in issue all matters pertaining to the ownership of the mare, "Cleaning Time," and a complete adjudication of the issues raised by the pleadings and at the trial required the rendition of a conclusive judgment disposing of such issues, including the property rights of the parties in the said mare. Accordingly, the Circuit Court of Appeals erred in failing to remand the cause to the District Court for the entry of a judgment in accordance with such issues and proper findings in support thereof.

Upon this phase of the case, the pleadings, consisting of counterclaim and answer, raising the issue of ownership and sale respecting "Cleaning Time", follow:

The counterclaim reads:

> "The Plaintiff is indebted to the Defendant in the sum of $1500.00 for the purchase of the mare 'Cleaning

Time' on or about August 26, 1939, which the Plaintiff purchased from the Defendant and of which sum no part has been paid." (R. p. 4.)

The answer states:

"In August, 1939, the Defendant instructed the Plaintiff to sell the mare 'Cleaning Time' for which he would receive a ten per cent (10%) commission. The Plaintiff was unable to obtain a purchaser and was forced to keep her to pay expenses. The mare broke down and the Plaintiff has continued to pay all expenses, etc." (R. p. 6.)

The decision of the Circuit Court of Appeals sustaining the District Court's finding, whereby the mare, after the deduction of training expenses, was to be paid for out of her earnings, is stated as follows:

"He explained that this arrangement was understood by both parties to mean that he would buy the mare on condition that he would be allowed to pay for her out of winnings and that her value would be determined by what she had run for in order to win a race. He further testified that the expenses of the mare amounted to more than her winnings, and his testimony was not contradicted. He still has the mare in his possession, and has raced her several times." (R. p. 224.)

The decision goes on to state by inference that your petitioner has a remedy as to her future rights and liabilities, stating:

"We express no opinion as to the present or future rights and liabilities of the parties to this suit with respect to the mare "Cleaning Time'." (R. p. 225.)

Your petitioner submits that this is an erroneous interpretation of the issues as tried and raised by the pleadings, more particularly as to her counterclaim under Rule 13(b), providing:

"A pleading may state as a counterclaim any claim against an opposing party not arising out of the trans-

> action or occurrence that is the subject matter of the opposing party's claim." (Appendix p. 24.)

Moreover, the Circuit Court of Appeal's interpretation is in direct conflict with the spirit and purpose of Rule 13 which was enacted mainly to discourage separate actions and to encourage the disposition of litigation in one action.

> *Moore* v. *New York Cotton Exchange*, 270 U. S. 593.
> *Schram* v. *Ducking*, 31 Fed. Supp. 749.
> *Carter Oil Co.* v. *Wood*, 30 Fed. Supp. 875.

In conformity with Rule 54(c) petitioner by way of relief, is entitled to a proper judgment covering the entire situation as developed by the facts and evidence adduced at the trial, regardless of whether she asked for such relief in her counterclaim, since the Rule provides that,

> "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." (Appendix p. 26.)

In *Keiser* v. *Walsh*, 118 Fed. (2d) 13, 14 App. D. C., the Court, in reversing a judgment dismissing a complaint, held that under Rule 54(c) it was not required to consider whether proper relief had been asked for, but applied the test that "any relief which the court can grant", should be accorded, saying:

> "We need not consider whether appellant has asked for the proper relief. By Rule 54(c) of the Federal Rules of Civil Procedure '* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' Accordingly as complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to any relief which the court can grant. Reversed."

To the same effect is *Downey* v. *Palmer*, 114 Fed. (2d) 116, C. C. A. Second.

In consequence of the decision of the Circuit Court of Appeals, petitioner is placed in the anomolous position of being confronted with a money judgment against her, although the judgment creditor (respondent) is indebted to her by reason of the possession and control of her property, the mare in suit, the value of which respondent fixed at between $1,000.00 and $1,500.00 (R. p. 197).

The result arrived at is the more astonishing since the Circuit Court of Appeals was moved in making its decision by the fact that the earnings of "Cleaning Time" gave petitioner "future rights" which could not be adjudicated at the time of the trial (R. p. 222).

Adopting the Circuit Court's reasoning of "future rights", we find that Rule 54(b) of the Federal Rules of Civil Procedure provides for the happening of future events and specifically meets the contingency of an accounting at some future date while permitting, at the same time, adjudication of existing rights between the parties.

Rule 54(b) reads as follows:

> "(b) *Judgment at Various Stages.* When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." (Appendix, p. 26.)

Under this rule, a judgment could have been entered for your petitioner defining the respective rights of your petitioner and respondent to "Cleaning Time" by reason of the "on the cuff" arrangement. The rule would permit the judgment to "prescribe such conditions as are necessary

to secure the benefit thereof" and would also permit the issuance of a stay to await the outcome of the earnings of "Cleaning Time", and, further, pending such outcome proper provisions could be made in protection of your petitioner's property rights in and ownership of the mare "Cleaning Time" which, in default thereof, would require its return or payment of the reasonable value.

All this, which the above quotation of the rule indicates, would not interfere with the entry in the meantime of a judgment in favor of respondent on his main claim of an open account.

Your petitioner, therefore, submits that the Circuit Court of Appeals, in not following the practice established by the Federal Rules of Civil Procedure herein indicated, has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, which did not render a judgment respecting the mare "Cleaning Time", as provided under said rules, as to call for an exercise of this court's power of supervision, (Rule 38(5b) of the Rules of the Supreme Court), and further, the error complained of, constitutes a denial of due process. As was said in *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 519, "In judicial proceedings, due process of law requires notice, hearing and judgment."

Point II.

The error respecting the written agreement (exhibit 5) cannot be cured by the ruling of the Circuit Court of Appeals that said written agreement is inadmissible, and that the judgment dismissing petitioner's "third" counterclaim can be sustained under rule 52(a) by the finding of an independent verbal agreement, since the error basically involves a failure to consider petitioner's evidence as to her version of said verbal agreement and a denial of due process.

In holding Exhibit 5 inadmissible for failure of proof of agency, the Circuit Court of Appeals said:

> "No evidence was introduced in proof of Furr's purported agency and this fact rendered the written memorandum of agreement inadmissible as evidence against appellant." (R. p. 225.)

Motions to have Exhibit 5 rejected as evidence and stricken from the record were made and all were denied by the District Judge.

In sustaining the dismissal of petitioner's "third" counterclaim involving the services of the stallion "Grand Time" amounting to $1500.00, the Circuit Court of Appeals affirmed the action of the District Judge upon respondent's version of a verbal agreement to the effect that it was understood by all parties that he was to have free stud services, the Court saying:

> "However, the opinion of the District Court shows that its finding was not based upon the written memorandum, but rather upon the oral evidence of appellee, who testified that it was understood by all parties, and was a part of a consideration for the sale of the stallion "Grand Time," that appellee was to have free service of the stallion" (R. p. 208).

Petitioner's evidence as to said verbal agreement on the other hand, was that there was to be no charge for two services for the years 1935, 1936 and 1937, but since three addi-

tional services were taken during the years 1938, 1939 and 1940, there was due her from respondent $500.00 for each service or a total sum of $1500.00 for said three additional services (R. p. 208).

The error of the Circuit Court of Appeals arose from the following finding of the District Judge, wherein and whereby, in admitting the written agreement (Exhibit 5) held inadmissible on Appeal, the District Judge would not and the Circuit Court, in turn, did not consider petitioner's evidence as to the verbal agreement upon which her "third" counterclaim was based:

> "True, the clause in the written agreement upon which plaintiff relies is itself ambiguous. If we assume that Furr had authority to sign on behalf of the defendant, and if he were here to testify, it would be permissible to have him give his interpretation of the clause, just as an attempt was made by the Court to obtain the plaintiff's interpretation of the clause, it is capable, of course, of an interpretation to the effect that the stallion should be brought to the mares free of any transportation expenses only, and not free of stud fees. Since mares are usually brought to the stud, and not the stud to the mare, this is not a totally unreasonable interpretation. Also, plaintiff's interpretation makes the free services of indefinite duration. But in the light of the other circumstances in the present case, I think defendant's interpretation is the less reasonable one. In other words, defendant's own conduct, in never acting in accordance with such interpretation over such a long period of time, negatives her right to such interpretation, or *to have the alleged verbal understanding displace this written one*" (Italics ours) (R. p. 208).

Thus, the District Court found that respondent's evidence of a written agreement with petitioner's purported agent, offered in defense to petitioner's "third" counterclaim, was ambiguous. It then accepted petitioner's evidence for the sole purpose of interpreting the ambiguity involved in said written agreement. In so limiting petitioner's evidence, the District Court found that such evi-

dence established an independent verbal agreement, and in applying the rule of law that a verbal independent agreement cannot be used to vary the express terms of a written agreement, if held that it would not consider her evidence, or in the language of the court "... negatives her right ... to have the alleged verbal understanding displace this written one."

The record clearly shows that petitioner denied the making of any written agreement or, if made, that Furr had no such authority, and, therefore, objected to its introduction and consideration in the evidence.

Moreover, petitioner's evidence established an independent verbal agreement between the principals as distinguished from the written agreement made with respondent and your petitioner's alleged agent; hence, such evidence was never offered by petitioner to interpret the ambiguity of the alleged written agreement between petitioner's agent and the respondent.

But, the use, to clarify an ambiguity of said written agreement, to which the District Court limited petitioner's evidence,—a mistake in applying the law—resulted in it being completely ignored and given no effect.

The Circuit Court of Appeals correctly held that the written agreement was inadmissible as evidence against petitioner (R. p. 226) and, in eliminating it as a basis for the District Court's finding, looked to respondent's oral testimony to sustain said finding, giving petitioner's evidence no consideration, for the District Court had originally rejected it and had so stated its rejection in its findings.

Accordingly, such evidence, having been rejected by the District Court in the light of the written agreement, was not reinstated by the Circuit Court in spite of its holding of error on the part of the court below in admitting said written agreement. In summary, there is thus presented the unusual situation of petitioner's evidence being disregarded by the District Court, and further disregarded by the Circuit Court of Appeals.

Since the error of the District Court was in connection with a vital and important question of law, Rule 52(a)—applicable to findings of fact only—should not and could not be invoked; yet, the Circuit Court made use of this Rule to justify a finding which clearly calls for appellate relief, and a reversal of the judgment of the District Court.

The question of due process is brought to the fore by reason of the fact that although petitioner was permitted to adduce evidence at the trial, such evidence, however, was never considered either by the District Court or the Circuit Court of Appeals; and, in consequence thereof, as a matter of law, prejudicial error was committed in connection with a vital and important question of law.

Since the District Judge in the making of a finding of a verbal agreement, which the Circuit Court of Appeals approved, used Exhibit 5—an incompetent document which should not have been in evidence—and gave it the legal effect of being unimpeached by the evidence adduced by petitioner, the following observation of the Court in *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 Fed. (2d) 704, 706, C. C. A. Third, that a finding of fact resting "upon an erroneous conception of the pertinent law," is not a fact found, is peculiarly appropriate:

> "It is also to be noted that one of the trial court's findings (No. 13) respecting the difficulty of the legal problem confronting the plaintiff, as defendant's counsel, rested not upon fact but upon matter of law. The relative importance of this finding is obvious. It undoubtedly influenced in no small measure, the trial court's appraisal of the extent and value of the plaintiff's services. Consequently, if the particular finding rests upon an erroneous conception of the pertinent law, its effect was harmful."

Equally applicable is the rule based upon the opinion of Mr. Chief Justice Fuller in *Crawford* v. *Neal*, 144 U. S. 585, 596, relating to the extent of appellate review of findings of fact and conclusions of law, as follows:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *State Bank*, 141 U. S. 107."

In making its decision, the Circuit Court of Appeals apparently ignored a previous decision made by it in *Beckley Nat. Bank et al.* v. *Boone et al.*, 115 Fed. (2d) 515, 516, where, in following *Crawford* v. *Neal, supra*, the Court said:

"In making this investigation, we must adhere to the rule that an appellate court will not disturb the findings of a special master, confirmed by a district judge, upon a disputed question of fact, unless a very plain mistake has been made (Citing cases).

"But as this court has said previously, the findings of a special master, as approved by the judge below, though entitled to weight, are persuasive only and not controlling. The review in this court is a real review and not a perfunctory approval. Crawford v. Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. Ed 649; National Manufacture & Store Corp v. Whitman, 4 Cir., 93 F. (2d) 829; see also Hoeltke v. C. M. Kemp Mfg. Co., 4 Cir., 80 F. (2d) 912, and Standard Acc. Ins. Co. v. Simpson, 4 Cir., 64 F. (2d) 583. See also 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c."

Petitioner submits she has overcome the presumption on appeal of the correctness of the findings of fact and conclusions of law by showing that not only was incompetent evidence (Exhibit 5), considered, but that the legal effect of such incompetent evidence resulted in the judgment dismissing petitioner's "third" counterclaim.

CONCLUSION.

It is therefore respectfully submitted that the errors in law of the court below, vitally affecting judicial proceedings, and the plain equities and justice of this case call for the exercise by this court of its supervisory powers and that to such an end a writ of certiorari should be granted herein.

Respectfully submitted,
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